ACCESS VS. FAIRNESS IN NEWSPAPERS: THE IMPLICATIONS OF TORNILLO FOR A FREE AND RESPONSIBLE PRESS

I. INTRODUCTION

Miami Herald Publishing Co. v. Tornillo,[1] while not the first decision of the United States Supreme Court to deal with some aspect of access to newspapers,[2] is, however, the first pronouncement coming from that bench to deal with the problem of the individual's right to have his views presented in the *printed* mass media. In that the issue resolved—whether the state can compel a private newspaper to publish replies to its editorial criticism—involves the opposite of the oft-confronted prior restraint problem, *Tornillo* is an important step in fully defining the parameters of the constitutional guarantee of a free press. Equally important may be *Tornillo*'s role as a harbinger of the reconciliation of fairness and freedom in this branch of the media through government initiative.

This article will proceed in three sections. The first presents the history and holdings of *Tornillo* as a framework within which the problem of governmental assurance of a balanced, yet free, press will be examined. The second section will examine the concept of access to the press. The role of media control will be examined as a factor in inhibiting press responsibility. The second section then traces the legal history of access, demonstrating how each of the various arguments employed to promote access has met with strong first amendment resistance. The section concludes with an assessment of the effectiveness of access in achieving a balanced presentation of public issues in the press. The third section examines the groundwork *Tornillo* may have laid for the imposition of a "Fairness Doctrine" upon newspapers. The Court's concern over balanced press coverage, the recognition of physical limitations on the expansion of the press, the role of editorial discretion, and the retreat from a policy of specifically disclaiming the viability of a newspaper "Fairness Doctrine" are examined as component parts of that groundwork.

II. SYNOPSIS OF FACTS AND OPINIONS

During 1972, Pat L. Tornillo, Jr., was a candidate for a seat in the Florida House of Representatives. On September 20 and September 29, 1972, *The Miami Herald* published editorials critical of Tornillo's candi-

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[1] 94 S.Ct. 2831 (1974).

[2] The issue has been tangentially involved in a number of newspaper antitrust cases. *E.g.*, Citizen Publishing Co. v. United States, 394 U.S. 191 (1969); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945). *See* discussion *infra* at III C.

dacy.[3] Following the publication of the second editorial, Tornillo, pursuant to the Florida "right of reply" statute[4] requested that the newspaper, at its expense, print verbatim a reply submitted by him. The newspaper refused to publish the tendered material.

Upon the *Herald's* refusal to publish the tendered material, Tornillo filed a civil action in the Circuit Court for the Eleventh Judicial Circuit (Dade County) seeking declaratory and injunctive relief, as well as punitive damages. Noting that the complaint sought civil enforcement of a criminal statute, the circuit court pointed out that, absent special circumstances, equity would not enjoin the commission of a crime. The court further found that the statute upon which the action was predicated, § 104.38, was constitutionally infirm in two respects: first, the compulsory publication requirements constituted a restraint upon free speech and press, and thus were repugnant to both the Florida constitution and to the fourteenth amendment of the United States Constitution; second, the statute was a vague and indefinite criminal provision, and thus denied due process.[5]

Appeal was taken to the Supreme Court of Florida, where the circuit court's decision holding § 104.38 unconstitutional was reversed in *Tornillo v. Miami Herald Publishing Co.*[6] Reasoning that freedom of expression "rests upon the necessity for a fully informed electorate,"[7] the court found that the purpose of § 104.38 was to facilitate the presentation of all sides of a controversy concerning candidates for public office. It believed that this purpose coincided with the policy of maintaining the unfettered opportunity for the exchange of political ideas enunciated in

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[3] The editorials opined that Tornillo's activities as Executive Director of the Classroom Teacher's Association (CTA), a collective bargaining unit, demonstrated his disregard for law and the public interest. At the center of the controversy were a 1968 teacher's strike, supposedly prohibited by statute, and allegations of soliciting campaign contributions from CTA members. The editorials are reprinted at 94 S.Ct. 2831, 2832 n.1 (1974).

[4] FLA. STAT. ANN. § 104.38 (West 1973):

> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

FLA. STAT. ANN. §§ 775.082 and 775.083 (West Supp. 1973) provide alternative penalties of no more than one year's imprisonment or a fine of $1,000 for first degree misdemeanors.

[5] Tornillo v. Miami Herald Publishing Co., 38 Fla. Supp. 80 (Cir. Ct. 1972).

[6] 287 So.2d 78 (Fla. 1973).

[7] *Id.* at 81. This premise will be recognized as that advanced by Professor Meiklejohn. *See, e.g.*, Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

New York Times Co. v. Sullivan.[8] The need for such a statute, the court stated, was all the more pressing in an age when the presentation of all facets of public issues "is being jeopardized by the growing concentration of the ownership of mass media into fewer and fewer hands, resulting ultimately in a form of private censorship."[9] The court held that when the means of disseminating opinion fall into the hands of a few, it is not an abridgment of freedom of the press to require those few to give access to others in order to present differing points of view. It relied upon *Red Lion Broadcasting Co. v. FCC*[10] to support the assertion that government may intervene to insure that the media present the multiplicity of opinion on a given subject. The opinion also cited the text and a footnote to Mr. Justice Brennan's opinion in *Rosenbloom v. Metromedia, Inc.*[11] as placing the imprimatur of the United States Supreme Court on such statutes.

In a unanimous decision, the United States Supreme Court reversed and held that the mandatory publication provisions in the statute violated the guarantee of a free and unabridged press contained in the first amendment and made applicable to the states by the fourteenth amendment.[12] In an opinion joined by five other Justices, Chief Justice Burger conceded that the concentration of media control in the hands of a few resulted in such power over the flow of information and ideas that biased and manipulative reporting had become a very real danger. Nonetheless, it was pointed out that the Constitution had opted for a free press, not a press whose fairness was controlled by the government's intervention. Such intervention would be equally suspect whether it came in the form of a command to publish or appeared in the guise of a prohibition on publication, for both encompass a penalty imposed because of content. Moreover, the penalty in this case acted as a double-edged sword: compliance by publishing the reply exacted a penalty in the form of additional printing costs, composing time and space limitations, while refusal to publish carried criminal sanctions. The only way to avoid either aspect of the penalty would have been to refrain from comment on political candidates.

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[8] 376 U.S. 254 (1964).

[9] 287 So.2d at 82-83.

[10] 395 U.S. 367 (1969). The constitutionality of the FCC's "Fairness Doctrine" was upheld in this case, the Court finding that there is no abridgment of first amendment freedoms when the government requires those who control scarce media resources to make those resources available for the presentation of views opposing those already presented.

[11] 403 U.S. 29, 47 (1971): "If the states fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of insuring their ability to respond . . . ."
Id. at n.15: "Some states have adopted retraction statutes or right of reply statutes."

[12] Miami Herald Publishing Co. v. Tornillo, 94 S.Ct. 2831 (1974).

Thus the statute effectively created a chilling effect upon the exercise of the freedoms protected by the first amendment. Even if the penalty were not so great as to restrain the exercise of media freedom, concluded the Chief Justice, the statute would run afoul of the first amendment by attempting to usurp the function of the editor, which function includes the authority to decide what will and what will not be published.

The two concurring opinions filed in *Tornillo* did not take issue with the Chief Justice's reasoning; indeed, in his opinion,[13] Mr. Justice White readily endorsed editorial discretion as a *ratio decidendi*. However, both Mr. Justice White and Mr. Justice Brennan, joined by Mr. Justice Rehnquist,[14] expressed concern over the effect that *Tornillo* might have upon other remedies for defamation. The former feared that *Tornillo*, combined with the more stringent damages rule laid down in *Gertz v. Robert Welch, Inc.*,[15] would vitiate a great deal of the law's protection of reputations; the latter two emphasized that they would not want *Tornillo* read as making any judgment on the constitutionality of "retraction" statutes.

III. The Right of Access

A. *Concentration of Media Control*

The heart of the access advocates' argument lies in what is seen as a climate of media control and non-responsiveness fostered by the structure of the newspaper business today. Two phenomena dominate that market in the United States—the "chain" newspaper and the monopoly newspaper.[16] Both challenge the existence of vigorous and even-handed coverage of events. The former, the daily that is but one of many units in a network of journals, each carrying the wire reports and syndicated columns chosen by a central editorial office, is forced into a conformity of format and ideology dictated by the efficient operation of the chain. Such uniformity, combined with the fact that that central office may be

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[13] *Id.* at 2840.

[14] *Id.*

[15] 94 S.Ct. 2997 (1974). At issue was the libel of a private individual in defendant's magazine. The Court held that first amendment protection did not extend to possible defamation of a private individual. Thus, such individuals need not prove the *New York Times* standard of "actual malice" in order to recover actual damages. However, the "actual malice" standard must be met in order to recover punitive damages.

[16] Recent estimates reveal that half of all dailies, accounting for three-fifths of total daily and Sunday circulation in the United States, are owned by groups, chains, and conglomerates. Monopoly newspapers—those receiving no real competition from other dailies in their geographic market (*viz.*, the "one newspaper town")—predominate; effective competition among such newspapers exists in only four percent of large U.S. cities. A. Balk, *Background Paper*, Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 18 (1973).

geographically remote from the community served, results in a press that is insensitive to the peculiarities and local concerns of its readership.[17] Consequently, complete coverage of local issues is rare. On the other hand, the monopoly newspaper often errs, not in the passive omission of opposing views, but in active one-sided coverage; rather than being unaware of opposition voices, a monopoly newspaper will ignore them.[18] This attitude is all the more threatening because of the single newspaper's opportunity to influence political decision-making in its dependent home community:

> What a local paper does not print about a local affair does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has the extraordinary power to set the atmosphere and determine the terms of local consideration of public issues.[19]

While either of these phenomena—the unresponsive and incomplete reporting of the "chain" newspaper and the over-zealous and biased coverage of the monopoly newspaper—can alone undermine the goal of "uninhibited, robust and wide-open"[20] debate inherent in the first amendment, their simultaneous occurrence in one paper can be devastating. A monopoly-chain newspaper could be both the sole conduit of information and the chief architect of opinion, all the while promoting that political persuasion favored by an alien editor, and ignoring any opposition prominent enough to have reached the attention of a corporate office miles away. Moreover, such a scenario appears to be the rule rather than the exception.[21]

Accepting *arguendo* this portrait of the newspaper power structure, as the Court did,[22] it nonetheless may depict too gloomy a picture, for it places daily newspapers in a vacuum wholly devoid of other means of spreading information and ideas. Perhaps a more realistic view of the availability of media is that presented by Dr. Raymond Nixon of the University of Minnesota. His survey reveals that, while over 1,500 cities have daily newspaper service, 1,298 of these also have "competing media

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[17] TWENTIETH CENTURY FUND, TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL, A FREE AND RESPONSIVE PRESS 4 (1973).

[18] Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate its readers with one philosophy, one attitude—and to make money.
Douglas, *The Bill of Rights Is Not Enough* in THE GREAT RIGHTS 124-25 (E. Cahn ed. 1963).

[19] B. BAGDIKIAN, THE INFORMATION MACHINES 127 (1971).

[20] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[21] *See* note 16 *supra.*

[22] 94 S.Ct. at 2838.

voices," *i.e.*, separately owned media outlets such as radio and television stations, weeklies, and magazines. In all, these "competing media voices" outnumber the dailies with which they compete by a ratio of nearly four to one.[23] Such an overwhelming numerical advantage should assure every advocate at least some vehicle for his views. As Mr. Justice Douglas pointed out in his concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, "for one publisher who may suppress a fact, there are many who will print it."[24]

Nonetheless, where such an environment of media control exists, as it does in the field of daily newspapers, access advocates contend that the preservation of an effective right of expression demands of the press some sort of enforceable obligation to responsibly present all facets of a public issue. One prominent playwright and journalist has suggested that the printed media is a public trust:

> Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics.[25]

Others, such as Professor Jerome Barron of George Washington University, believe that the first amendment demands access itself, not just representation dictated by the self-determined discretion of editors: "A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications."[26] Moreover, access must be an absolute right; even the limited access imposed upon the broadcasting media by the "fairness doctrine" has left enough control in the owners of the stations to abnegate freedom of expression in certain instances.[27]

However, as Professor Barron notes, "[O]ur constitutional law has been singularly indifferent to the reality and implications of non-govern-

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[23] Nixon, *Trends in U.S. Newspaper Ownership: Concentration with Competition*, 14 GAZETTE 181 (1968).

[24] 412 U.S. 94, 153 (1973).

[25] A. MacLeish in W. HOCKING, FREEDOM OF THE PRESS, 99 n.4 (1947). The trust analogy has been frequently used with reference to broadcast frequencies. *See, e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

[26] Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1648 (1967).

[27] Barron, *Access—The Only Choice for the Media*, 48 TEX. L. REV. 766, 769-70 (1970). As if to underscore this contention, it has been held recently that broadcasters have discretion in the details of implementing their obligations under the "fairness doctrine." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94 (1973).

mental obstructions to the spread of political truth."[28] Such "indifference" is probably traceable to the structure of the press at the time of the adoption of the first amendment. In the late eighteenth and early nineteenth centuries, entry into the publishing business was relatively unencumbered by economic and technological barriers. What is more, alternatives to newspapers, as we have come to know them, abounded.[29] The choice was made between the risk that some would abuse the unfettered freedom to publish and a more obnoxious danger of government censorship and control.[30] Thus, the choice between a free press and a fair press had been made long before *Tornillo* came up for decision: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[31]

B. *The Commercial Advertising Cases*

The bulk of the precedents dealing directly with the compulsory publication issue have involved a newspaper's refusal to print tendered commercial advertising at the advertiser's expense. In only one decision to date, *Uhlman v. Sherman*,[32] has a court granted injunctive relief in aid of publication. Although *Uhlman* can be distinguished on its facts,[33] other courts that have discussed the case have chosen to characterize its holding as an anomalous minority rule and have rejected it as such.[34] Ironically, however, most of the advertising-rejection cases have relied upon fourteenth amendment liberty of contract considerations rather than upon the first amendment rationale enunciated in *Tornillo*. To require a newspaper to enter into a contract to print advertising would infringe upon liberty, for

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[28] Barron, *supra* note 26, at 1643.

[29] Miami Herald Publishing Co. v. Tornillo, 94 S.Ct. 2831, 2835 (1974):

> Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

[30] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 125 (1973).

[31] Miami Herald Publishing Co. v. Tornillo, 94 S.Ct. 2831, 2839 (1974).

[32] 22 Ohio N.P.(n.s.) 225, 31 Ohio Dec. 54 (C.P. 1919).

[33] The action was brought by Uhlman against the newspaper publisher and three of Uhlman's business competitors. In seeking injunctive relief, the plaintiff alleged that the three competitors had induced the newspaper, through the publisher, to reject Uhlman's proffered advertisements, thus giving the competitors a business advantage. 22 Ohio N. P. (n.s.) at 225-26, 31 Ohio Dec. at 54. As such, the case contains elements of unfair trade practices and boycott not to be found in other instances of advertisement rejection.

[34] *See, e.g.*, Bloss v. Federated Publications, Inc., 5 Mich. App. 74, 145 N.W.2d 800 (1966), *aff'd mem.*, 380 Mich. 485, 157 N.W.2d 421 (1968).

> the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reasons whatever, and it is immaterial whether such refusal is based upon reason or is the result of mere caprice, prejudice or malice. It is a part of the liberty of action which the Constitutions, State and Federal, guarantee to the citizen.[35]

Only in more recent cases have the courts begun to treat the problem as one of restriction upon the media's first amendment freedom. In this respect, courts have become accustomed to dealing with prior restraint upon the press; statutes permitting such restraint prior to publication are presumed unconstitutional unless the infringement is justified by a "clear and present danger" to a vital public interest.[36] Compulsory publication has merited similar treatment:

> There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material.[37]

While, as mentioned, most of the cases in the area have involved commercial advertising, the aversion to compulsory publication has not been limited thereto. The aversion has been extended to almost all instances in which a party pays a newspaper to publish the material submitted to it. It has been held that a newspaper may not be required to print either political advertisements[38] or legal notices[39] when the newspaper does not bear the cost of publication.

Concededly, the material involved in *Tornillo* would not generally be considered advertising;[40] nor was the cost of publication to be borne by an outside party. These distinctions do not, however, serve to place the situation in *Tornillo* outside the scope of the advertising precedents. Instead, the characterization of Tornillo's reply as an element in the exchange of political ideas places it even further from the grasp of compul-

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[35] Poughkeepsie Buying Serv., Inc. v. Poughkeepsie Newspapers, Inc., 205 Misc. 982, 984, 131 N.Y.S.2d 515, 517 (Sup. Ct. 1954). *See also* Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933).

[36] Schenck v. United States, 249 U.S. 47, 52 (1919). The first amendment and the "clear and present danger" criteria were made applicable to the states in Gitlow v. New York, 268 U.S. 652 (1925). Applications of the test abound. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (ordinance prohibiting publications causing breach of the peace); Thomas v. Collins, 323 U.S. 516 (1945) (registration of labor organizers).

[37] Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (9th Cir. 1971). *See also* Chicago Joint Bd., Amal. Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir.), *cert. denied*, 402 U.S. 973 (1971).

[38] Chronicle & Gazette Publishing Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946), *appeal dismissed*, 329 U.S. 690, *reh. denied*, 329 U.S. 835 (1947).

[39] Commonwealth v. Boston Transcript Co., 249 Mass. 477, 144 N.E. 400 (1924).

[40] *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 414 (1970); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1192, 1195 (1965).

sory publication. Commercial advertising enjoys only limited first amendment protection: while its publication may be neither unduly restrained nor compelled, it is, nonetheless, subject to regulation.[41] Political expression, on the other hand, "enjoys the fullest protection of the first amendment."[42] In that the full protection granted political expression encompasses that limited protection afforded commercial print, political expression, like commercial print, also may not be printed by order of the government. Indeed, this is the conclusion reached in *Tornillo*.

C. *The Newspaper Antitrust Cases*

Access proponents have long looked to the antitrust cases involving newspapers for support of their argument that the first amendment does not sanction non-governmental restraint upon the exercise of free expression.[43] In particular, the following language from *Associated Press v. United States*[44] has been all but the keystone of their theory:

> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*

Taken by itself, the emphasized language would seem to support the access position. However, *Associated Press's* pronouncement is applicable only in certain limited instances which rarely appear in the case of one seeking access to express political views.[45] Moreover, a media monopoly by itself would be insufficient to invoke the implementation of this command;[46] what must be present is a combination or attempted combination with the purpose of monopolizing or restraining.[47] Not only

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[41] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[42] United States v. Hunter, 459 F.2d 205, 211 (4th Cir. 1972).

[43] Barron, *supra* note 26, at 1654.

[44] 326 U.S. 1, 20 (1945) (emphasis supplied).

[45] Three of the more prominent cases in the area involved refusals to accept commercial advertising from merchants also advertising through other media outlets. Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957). *Associated Press* involved wire service subscription and only incidentally political expression.

[46] "[T]hough a particular newspaper may enjoy a virtual monopoly in the area of its publication, this fact is neither unusual nor of important significance." Approved Personnel, Inc. v. Tribune Co., 177 So.2d 704, 706 (Fla. Ct. App. 1965).

[47] *See* Sherman Act, 15 U.S.C. § 1 *et seq.* (1972).

does *Associated Press* point this out, but the requirement was made quite explicit in *Lorain Journal Co. v. United States:*

> "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (emphasis supplied)[48]

It may become increasingly difficult to demonstrate such a purpose on the part of a monopoly newspaper. Congress seems to have taken legislative notice of the fact that many newspaper monopolies and chains have been brought about by economic conditions rather than by any conscious intent to monopolize communications and has passed the Newspaper Preservation Act,[49] granting limited immunity from the antitrust laws to "joint operating agreements" between newspapers.[50]

If, however, a combination to restrain the exercise of first amendment freedoms could be shown, and if that combination was not protected by the Newspaper Preservation Act, it is doubtful that the antitrust laws would go as far as the access theory demands. In addition to limiting its application to antitrust situations, *Associated Press* restricted the scope of relief available under the Sherman Act: the decree did "not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published."[51] Thus, an antitrust decree would still vest substantial discretion in the editor, and that discretion would abnegate at least Professor Barron's concept of a right of access.[52] Moreover, it was precisely this language that Chief Justice Burger used to distinguish *Associated Press* and the other newspaper antitrust cases from the situation presented in *Tornillo*.[53]

D. *Access Under State Action*

In those instances where the instrumentality of public communication has been operated by or under the control of the government, what at first appears to be an unqualified right of access has been recognized. Even the limitations placed on such a supposed right by *Lehman v. City*

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[48] 342 U.S. 143, 155 (1951) (quoting from United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

[49] 15 U.S.C. §§ 1801-04 (1970).

[50] The joint operating agreement between *The Miami Herald* and *The Miami News* has been noted as one of those protected by the act. 116 CONG. REC. 1783 (1970).

[51] 326 U.S. 1, 20 n.18 (1945).

[52] *See* text accompanying notes 26 and 27 *supra*. *See also* discussion of editorial discretion at III *infra*.

[53] 94 S.Ct. at 2838-39.

of Shaker Heights,[54] involving advertising on public vehicles, would not appear to appreciably vitiate an obligation to provide access to traditional channels of communication owned by the state. Indeed, *Wolin v. Port of New York Authority*,[55] involving the distribution of anti-war leaflets in a state-owned bus terminal, seems to have anticipated the holding in *Lehman*. Judge Kaufman, writing the opinion on appeal in *Wolin*, makes a cogent argument concerning the appropriateness of the terminal as a forum for the dissemination of political ideas, concluding with the following test:

> The propriety of a place for use as a public forum does turn on the relevance of the premises to the protest, but this relation may be found in two ways. In some situations, the place represents the object of the protest . . . . In other situations, the place is where the relevant audience may be found.[56]

In that the relevant audience sought *i.e.*, servicemen, could be readily found in a bus terminal, *Wolin* found that the terminal was an appropriate first amendment forum. Other state action access cases, however, do not venture so close to the perimeter now established by the *Lehman* forum rule.

Particularly in point are those cases involving high school and state college operated newspapers. In both *Zucker v. Panitz*[57] and *Lee v. Board of Regents of State Colleges*,[58] students sought to place paid advertising protesting the Vietnam War in school newspapers. School authorities refused to allow publication, citing regulations prohibiting the printing of such "controversial" material. However, having first found that the school newspapers were "true" newspapers, not just instructional laboratories, the district courts in both cases held that the regulations relied upon by the school authorities were prohibited prior restraints upon the press by the government. Such holdings illustrate the major feature of state action access cases that significantly qualifies their use in support of the access theory generally. The "right of access" supported therein is not a positive right, rather, it evolves as a result of the application of traditional first amendment considerations of governmental abridgment

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[54] 94 S.Ct. 2714 (1974). The refusal of a city and its agent, Metromedia, Inc., to sell advertising card space on the side of public transportation to a political candidate was upheld, even though such card space was regularly sold to commercial advertisers. The Court, in a 5-4 decision, held that the side of public transportation was not a protected first amendment forum.

[55] 268 F. Supp. 855 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

[56] 392 F.2d at 90.

[57] 299 F. Supp. 102 (S.D.N.Y. 1969).

[58] 306 F. Supp. 1097 (W.D. Wis. 1969).

of press freedom. *Zucker*, especially, explains that the access upheld flows directly from the state's involvement and that the situation presented in it is wholly different than would be one involving privately-owned media.[59]

The state action involved in *Tornillo* has just the opposite effect as that involved in *Zucker* and *Lee*: it seeks to affirmatively require access rather than to prohibit it. It retains, nonetheless, the character of proscribed governmental intervention into the operations of media: "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant from publishing specified matter."[60] As such, *Tornillo* represents the other side of the same coin involved in those state action cases to which access advocates have, in the past, looked for support: state action can be used neither to aid nor to hinder access.

Tornillo may cause access proponents to shift their emphasis from the creation of a positive right of access—*i.e.*, expanding the duty owed by media to the public—to the restriction of the ability of the press, as a public servant, to deny discretionary access. Professor Barron seems already to have suggested a means of achieving such a result:

> If such facilities [private media], even though privately sponsored, are also "dedicated to a public use," then presumably the same affirmative obligations are placed on those facilities [as on government-owned facilities]. The blurring of what is "private" and what is "public," which has come to characterize so much of our life, eventually may create an access-oriented approach to first amendment values which will endow any natural or obvious forum in our society with responsibilities for stimulating the communication of ideas.[61]

Instead of attempting to derive a *right* to access from such cases as *Wolin*, *Zucker* and *Lee*, the tactic may now be to construe media refusal to grant access to be state action under the public function doctrine.[62]

The concepts of "public" and "private," however, will have to become considerably more "blurred" before newspapers can be considered to be performing government-like functions. *Associated Press v. United States* has already explicitly declared that the business of publishing newspapers is a wholly private enterprise, not a public utility.[63] More-

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[59] *See* 299 F. Supp. at 104, 105 n.4.

[60] 94 S.Ct. at 2839.

[61] Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487, 494 (1969).

[62] The public function doctrine was first announced in Marsh v. Alabama, 326 U.S. 501 (1946). In essence, it states that government-like activities carried on by private entities in lieu of performance by government of the same function is state action and is subject to state regulation.

[63] 326 U.S. 1, 19 (1945).

over, the nature of the activity carried on by a newspaper provides a compelling reason for doubting whether newspapers will ever be encompassed by the public function doctrine. "[T]he historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic, not its accomplice."[64] Since the press acts as a critic of, and watchdog over, government, its effectiveness in this role and, consequently, the public interest "demands that the press shall remain independent, unfettered by governmental regulation."[65] Moreover, this same reasoning precludes attempts to impute state action to a private newspaper because of co-operation between it and the government in limited areas.[66] As Mr. Justice Stewart has pointed out, such imputation belies the separation of media and state inherent in the first amendment.[67] Indeed, it would appear that, in the case of newspapers, the blurring anticipated by Professor Barron has not yet begun: newspapers are by organization, nature, function and constitutional decree entirely distinct entities from those which could be characterized as public.

E. *The Chilling Effect*

One of the purposes of a right of reply statute, and the one discussed by the Florida Supreme Court in its consideration of *Tornillo*, "is to make newspapers . . . serve as better instrumentalities for the dissemination of conflicting and divergent points of view."[68] The statute purported to achieve this goal by requiring the publishing of subject-drafted responses to media criticism of candidates. Such replies were seen as the opportunity to present defense and refutation in the same forum and before the same audience as the attack. The real effect of such a statute, as Chief Justice Burger noted, could be that, "under the operation of the Florida statute, political and electoral coverage would be blunted or reduced,"[69] thus lessening the play of discussion rather than broadening it.

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[64] Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100, 1105 (D. Colo. 1971). The exposé of the Watergate affair by the *Washington Post* demonstrates the substance of such a proposition.

[65] Bloss v. Federated Publications, Inc., 5 Mich. App. 74, 84, 145 N.W.2d 800, 804 (1966).

[66] The leading cases involving the imputation of state action to private concerns engaged in joint ventures with the government, as in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), are examined and found inapplicable to newspapers in Chicago Joint Bd., Amal. Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir.), *cert. denied*, 402 U.S. 973 (1971).

[67] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 133 (1973) (Stewart, J., concurring): "This is a step along a path that could eventually lead to the proposition that private *newspapers* 'are' Government. Freedom of the press would then be gone."

[68] Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 896 (1948). *Cf.* Chafee, *Possible New Remedies for Errors in the Press*, 60 HARV. L. REV. 1, 26 (1946).

[69] 94 S.Ct. at 2839. *See also* T. EMERSON, *supra* note 40, at 671.

The operation of the statute involved in *Tornillo*, § 104.38, had to be "triggered" by the initiative of the newspaper. Indeed, the statute embodied an implicit assumption that the newspaper would exercise that initiative by commenting on candidates for public office. Nonetheless, the existence of such a statute militated against editorial commentary, for it subjected the newspaper to involuntary burdens once the comment had been made. It subjected the publishers to a type of "retribution solely because of what they [chose] to think and publish."[70]

This retribution could have taken one of two forms: the newspaper might have undertaken the burden of printing the replies. Such a course would have involved considerable time and expense, as the Court noted,[71] and could potentially tie up a great deal of space on the pages of any one issue.[72] On the other hand, the newspaper might have refused to comply, thereby subjecting itself to criminal sanctions. Faced with such a dilemma, "with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy . . . ."[73] The editor might very likely have chosen to abdicate both his responsibility to the public and his own first amendment right by refraining from making any initial comment at all. As Judge J. Skelly Wright put it, in *Washington Post Co. v. Keogh*:

> Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide open . . . .[74]

Arguably, the harassment and self-censorial impact of a criminal statute, such as the one involved in *Tornillo*, is even greater than that of a libel suit, as was involved in *Keogh*. Nonetheless, the self-censorial aspect is present, for only by censoring its own remarks vis-à-vis candidates could a newspaper escape the dilemma of increased costs or statutory penalty. Moreover, the dilemma forcing abstention from comment would exist even if the likelihood of the eventual imposition of the sanction was minimal.[75] Neither the laxity of enforcement nor the absence of success

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[70] Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1960) (Harlan, J.). "The Florida statute exacts a penalty on the basis of the content of a newspaper." Miami Herald Publishing Co. v. Tornillo, 94 S.Ct. at 2839.

[71] 94 S.Ct. at 2839.

[72] Daniel, *Right of Access to Mass Media—Government Obligation to Enforce First Amendment?*, 48 TEX. L. REV. 783, 785 (1970).

[73] 94 S.Ct. at 2839.

[74] 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

[75] Since its adoption in 1913, the Florida right of reply statute has been the basis for legal

in prosecution removes the discouragement, the "chilling effect," caused by the statute's mere existence:

> The very *possibility* of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone," thereby keeping protected discussion from public cognizance.[76]

If the "chilling effect" caused by the dilemma presented by the statute results in the press's withdrawal from political commentary, the operation of the statute would not be "triggered." Not only would the public be denied the opportunity to read the candidate's reply, but any initiating commentary would be silenced as well. Rather than expand the spectrum of viewpoints presented, the Florida statute struck down in *Tornillo* would have narrowed it to the point of non-existence. This muting of responsible political criticism would do more than just dampen the vigor and limit the variety of public debate;[77] it would have had the potential to eliminate it from newspapers entirely.

IV. The Prospects for a Newspaper Fairness Doctrine

While *Tornillo* holds that a newspaper may not be required to print specific material, it leaves open for all practical purposes, the question of whether the government might, in the future, impose upon the press a general obligation to exercise some sort of balance in the presentation of material on important public issues. Not only is the constitutionality of the application of something analogous to the "Fairness Doctrine" to newspapers left unresolved, but it also appears that the first cautious steps may have been taken in clearing away barriers to such a statute. The Court's dissatisfaction with the tendency toward one-sided reporting,[78] its use of the editorial discretion argument, its discussion of the real and practical limitations on the expansion of the number of newspapers and newspaper space, and the striking absence of any reference whatever to *Red Lion Broadcasting Co. v. FCC*,[79] taken individually, might not indicate any significant development. However, when taken together, these elements lay an excellent foundation for the expansion of the "Fairness Doctrine" to newspapers.

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action only once, other than *Tornillo*. In State v. News-Journal Corp., 36 Fla. Supp. 164 (Volusia County J. Ct. 1972), as in the initial decision in *Tornillo*, the statute was found to be unconstitutionally restrictive of a free press.

[76] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971) (emphasis supplied).

[77] Miami Herald Publishing Co. v. Tornillo, 94 S.Ct. at 2839 (quoting from New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

[78] *See* text at III A, *supra*.

[79] 395 U.S. 367 (1969).

At the outset, the term "Fairness Doctrine" must be defined, and distinguished from, the equal time rule. The "Fairness Doctrine" has evolved as a result of FCC case law interpretation of the "public interest" licensing standard of the Communications Act of 1934.[80] Its essential elements dictate that broadcast licensees provide adequate coverage of controversial issues of public importance,[81] that such coverage fairly present all facets of the question,[82] and that such fair and adequate coverage be undertaken at the broadcaster's expense[83] and initiative[84] if no outside party comes forth to make such presentation. The equal time rule is primarily statutory in nature and is limited in its application to political candidates.[85] Moreover, the opportunity for presenting opposing views under the "Fairness Doctrine" need not meet the precise balancing of the equal time rule; rather, "reasonable opportunity" is the governing standard.[86] The philosophy behind the "Fairness Doctrine" was well expressed by Professor Meiklejohn: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[87]

It is readily apparent from the extensive discussion of the development and effect of concentrated control of newspapers in Chief Justice Burger's opinion,[88] that the Court feels that "everything worth saying" may not be being said in the printed media. Though that medium may adequately cover crucial public issues, there is some question as to whether it does so fairly. And, in the case of "chain" newspapers, there are significant doubts as to whether internal initiative alone is sufficient impetus to get the whole story.[89]

The coverage by one printed medium may not measure up to the standard of even-handed coverage required of the electronic media. But before that standard is imposed upon newspapers, it should be determined whether the printed press shares those characteristics of the radio and tele-

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[80] 47 U.S.C. § 301 (1970).

[81] United Broadcasting Co., 10 F.C.C. 515 (1945).

[82] New Broadcasting Co., 6 P.&F. Radio Reg. 258 (1970).

[83] Cullman Broadcasting Co., 25 P.&F. Radio Reg. 895 (1963).

[84] John J. Dempsey, 6 P.&F. Radio Reg. 615 (1950): Metropolitan Broadcasting Co., 19 P.&F. Radio Reg. 602 (1960).

[85] Communications Act of 1934, 47 U.S.C. § 315(a) (1970). In brief, the statute requires broadcasters to grant equal opportunities for candidates for a political office to use their facilities, if any other candidate for the same office has been permitted to use the facilities. Exempted from the operation of the rule are bona fide newscasts, news interviews, news documentaries, and on-the-spot news coverage.

[86] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369 (1969).

[87] A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1948).

[88] 94 S.Ct. at 2835-38.

[89] *See* text accompanying note 17 *supra.*

vision media that required the establishment of a "Fairness Doctrine" in the first place. It has been said that the necessity of a "Fairness Doctrine" lies in the peculiar nature of the airwaves, the broadcast frequencies, the instrumentalities of that mode of journalism. In upholding the constitutionality of the "Fairness Doctrine," the Court, in *Red Lion Broadcasting Co. v. FCC*[90] noted that there was a limit to the number of broadcast frequencies available for use; not all who wish to may take to the airwaves simultaneously. Therefore, regulation is permitted in order to assure that the few who gain access to this scarce commodity through the acquisition of a broadcast license do not abuse their right to use this resource. Freedom of speech and press is not abridged

> by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication . . . .[91]

Moreover, the *Cullman* doctrine, in requiring that contrasting views be represented at the broadcaster's expense if proponents of such views cannot afford to buy air time,[92] further assured that the multiplication of such voices was not hindered by economic barriers.

Prior to *Tornillo*, however, the Supreme Court had always indicated that, because newspapers did not have a physical limitation comparable to the broadcast frequencies, a "Fairness Doctrine" was not applicable to them. While this *caveat* was only implied in *Red Lion*[93] it became quite explicit in *Columbia Broadcasting System, Inc. v. Democratic National Committee*: "Unlike *other media*, broadcasting is subject to an inherent physical limitation."[94] Indeed, newspapers were seen as bounded only by the economics of putting an issue on the streets.[95]

In *Tornillo*, however, the Court may have begun to retreat from this position. While the economic limitation language of *Columbia Broadcasting* was repeated,[96] language appearing later in the opinion intimates that that limitation may make newspaper space every bit the scarce resource that broadcast frequencies are considered to be:

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[90] 395 U.S. 367, 390, 391 (1969).

[91] *Id.* at 401 n.28.

[92] Cullman Broadcasting Co., 25 P.&F. Radio Reg. 895 (1963); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 123-24 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

[93] 395 U.S. at 386.

[94] 412 U.S. at 101 (emphasis supplied).

[95] 412 U.S. at 117.

[96] 94 S.Ct. at 2838.

> It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.[97]

Not only is space in existing newspapers limited, but the possibility of creating more column space by establishing more newspapers is slim; the Court recognized that entry into the newspaper market is all but impossible today.[98] Thus, parallels between air time and column space, between the number of frequencies and the number of newspapers, seem to emerge from *Tornillo*. At the same time, the earlier limitations on the applicability of a "Fairness Doctrine" to newspapers, found in *Red Lion* and *Columbia Broadcasting* are not repeated. Indeed, *Red Lion* is not even mentioned in the opinion, and its absence is particularly striking due to the Florida supreme court's reliance upon it.

Upon first reading, the brief discussion of the role of editorial discretion in *Tornillo* would seem to have little bearing upon the propriety of a "Fairness Doctrine" for newspapers. The exercise of freedom of choice over what will and will not go into a newspaper has long been regarded as an integral part of, and implicit in, a free press.[99] Reaffirming such a stance, in fact, may be all that the Court, in *Tornillo*, intended. Yet, given the retreat from the strict broadcast-newspaper dichotomy, the editorial discretion language may refer to something more; it may be a further signal that the Court is prepared to consider a "Fairness Doctrine" for the printed media.

The concept of broadcaster judgment has long been an integral part of the "Fairness Doctrine." In the implementation of the policy, the individual broadcaster

> is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming.[100]

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[97] *Id.* at 2839.

[98] *Id.* at 2836.

[99] *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945), declaring that the antitrust decree was not to interfere with editorial discretion ("reason"). *See also* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 117-18 (1973), ascribing broader discretion to newspapers than to broadcasters.

[100] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964). *See also* Letter to Mid-Florida Television Corp., 40 F.C.C. 620, 621 (1964).

This broad power over the implementation of the "Fairness Doctrine" has been repeatedly upheld in the courts.[101] Moreover, as an incident of this discretion, the broadcaster has the power to refuse to sell airtime to proponents of contrasting points of view, so long as the general edict of the "Fairness Doctrine" is complied with.[102]

Because of the editor's discretion, the "Fairness Doctrine" differs from a right of access. Indeed, Congress expressly rejected the idea of an access doctrine in enacting the Communications Act of 1934.[103] The limitations of time and frequency availability would make an access doctrine unworkable; rather, the broadcaster was given the power to select spokesmen and presentations to be part of the station's programming and to represent those of similar persuasion.[104] The "Fairness Doctrine" is, therefore, a compromise between the impossibility of total access and the threat of a broadcaster-imposed "gag" on opposition views.

If the Court in *Tornillo* perceives a threat of voices being silenced by the newspaper industry, and if newspaper space is, indeed, a limited commodity, a "Fairness Doctrine" allowing discretion in its implementation—a discretion similar to that now found in broadcasting—is not ruled out by *Tornillo's* ban on access. On the contrary, it appears to be encouraged. The enforcement of such a policy presents a major problem: licensing, the enforcement mechanism for broadcasting, would be out of the question as a prior restraint. It would seem, however, that such regulation could be tied to advantages newspapers now receive in their business operations—*e.g.*, lower mail rates, shipment in interstate commerce, and the limited antitrust immunity of the Newspaper Preservation Act[105] —without infringing on first amendment rights. Newspapers would be at liberty to comply with the "Fairness Doctrine," but failure to comply would result in curtailment of these benefits.[106] Because a "Fairness Doctrine" would allow discretion in the manner of presentation of contrasting material, rather than the exactitude commanded by the right of reply statute, no "penalty" of increased composing time or production costs, which the Court alluded to in *Tornillo*, need be present. The

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[101] *See, e.g.*, Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971); Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[102] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94 (1973).

[103] *Id.* at 105, 110, 122.

[104] *Id.* at 111.

[105] 15 U.S.C. §§ 1801-04 (1970).

[106] *Cf.* Belleville Advocate Printing Co. v. St. Clair County, 336 Ill. 359, 168 N.E. 312 (1929), holding that a newspaper could not be compelled to publish tax assessment lists, but once it chose to do so, it was bound by the statutory advertising rate.

newspaper would be free to develop fair treatment within its existing format.

V. CONCLUSION

Tornillo's resolution of the compulsory publication issue was not unexpected; indeed, it is but the latest instance of an ongoing aversion to allowing governmental dictation of what will or will not go into a newspaper. To allow such leverage over the press would, in all likelihood, result in a *less* diverse press. Yet, the Court does not seem completely satisfied with the conduct of the independent press to date. The language of *Tornillo* evidences stirrings that may mark the beginnings of a new approach toward achieving a balanced presentation of public issues in the private press. *Tornillo*, in holding that government commands to publish specific material are obnoxious to the first amendment, has very likely been the death knell of the access doctrine; but, rising from these ashes may be a more general requirement that the press treat public issues in a more even-handed manner. Such balance may even be governmentally induced without running afoul of the free press guarantee, especially if editors are allowed a free hand in developing and implementing the mechanics of that balance.

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